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Criminal Law - Federal Rule of Criminal Procedure 41 Authorizes Electronic Intrusions if Probable Cause Established, All Writs Act Provides for an Order to a Third Party Commpelling Aid in Criminal Enforcement Proceeding if Third Party Could Otherwise Frustrate Administration of Justice

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CRIMINAL LAW—FEDERAL RULE OF CRIMINAL PROCEDURE 41 AUTHORIZES ELECTRONIC INTRUSIONS IF PROBABLE CAUSE ESTABLISHED; ALL WRITS ACT PROVIDES FOR AN ORDER TO A THIRD PARTY COMPELLING AID IN CRIMINAL ENFORCEMENT PROCEEDING IF THIRD PARTY COULD OTHERWISE FRUSTRATE ADMINISTRATION OF JUSTICE.

United States v. New York Telephone Co. (U.S. 1977)

In response to an affidavit submitted by agents of the Federal Bureau of Investigation (FBI) alleging that certain telephones were being used in furtherance of illegal gambling activities, the United States District Court for the Southern District of New York issued an order authorizing the FBI to install pen registers[1] on the telephone lines and to use the devices "until knowledge of the numbers dialed led to the identity of the associates and confederates of those believed to be conducting the illegal operation."[2] As part of the order, the court directed the New York Telephone Company (Company) to furnish the government agents with "all information, facilities and technical assistance" necessary to install the pen registers.[3] The Company agreed to provide information as to terminal locations but refused to furnish the FBI with the telephone lines necessary to install the pen registers in an unobtrusive manner.[4] Moving to vacate that part of the district

1. In United States v. Caplan, 255 F. Supp. 805 (E.D. Mich. 1966), the monitoring device referred to as a pen register was described as a

> device attached to a given telephone line usually at a central telephone office. A pulsation of the dial on the line to which the pen register is attached records on a paper tape dashes equal in number to the number dialed. The paper tape then becomes a permanent and complete record of out going numbers called on the particular line. With reference to incoming calls, the pen register records only a dash for each ring of the telephone but does not identify the number from which the incoming call originated. The pen register cuts off after the number is dialed on outgoing calls and after the ringing is concluded on incoming calls without determining whether the call is completed or the receiver is answered. There is neither recording nor monitoring of the conversation.

Id. at 807. *See* United States v. Giordano, 416 U.S. 505, 549 n.1 (1974) (Powell, J., concurring in part); Claerhout, *The Pen Register*, 20 DRAKE L. REV. 108 (1970).

Although the pen register devices have the capability of intercepting the contents of a telephone conversation when coupled with wiretapping equipment, a court can limit or prohibit the monitoring or recording of conversations by ordering that the pen register not be used in conjunction with any other equipment. *See* United States v. Southwestern Bell Tel. Co., 546 F.2d 243, 244 n.1 (8th Cir. 1976); *In re* Joyce, 506 F.2d 373, 377 n.4 (5th Cir. 1975).

2. United States v. New York Tel. Co., 434 U.S. 159, 162 (1977). The district court determined that there was probable cause to believe that facilities of interstate commerce were being used to further illegal gambling activities in violation of various provisions of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§ 371, 1952 (1976). United States v. New York Tel. Co., 434 U.S. at 162.

3. 434 U.S. at 161. The FBI was ordered to compensate the Company at the prevailing rate for all assistance rendered. *Id.*

4. *Id.* at 162. The Company suggested that the FBI "string cables from the 'subject apartment' to another location where pen registers could be installed." *Id.* at 163. The FBI concluded, however, that any such installation would alert the suspect to the investigation. *Id.*

In refusing to lease the necessary lines to the FBI, the Company indicated that telephone company regulations prohibited it from giving such assistance. Application of the United States in the Matter of an Order Authorizing the Use of a Pen Register or Similar Mechanical Device, 538 F.2d 956, 957-58 (2d Cir. 1976), *rev'd sub nom.* United States v. New York Tel. Co., 434

court order,[5] the Company argued that only an order issued in compliance with Title III of the Omnibus Crime Control and Safe Streets Act (Title III)[6] could require it to furnish these facilities and this type of assistance to the FBI.[7] The district court denied the motion, holding that pen registers are not subject to Title III's requirements, that the use of the devices must comply with the strictures of the fourth amendment, and that the court either possessed statutory authority under the All Writs Act (Act)[8] or had inherent authority to compel the Company to assist the government agents in the use of the pen registers.[9]

On appeal,[10] the United States Court of Appeals for the Second Circuit affirmed the district court's determination that pen registers fall outside the purview of Title III,[11] and held that the district court had the power to authorize the use and installation of pen registers by virtue of its inherent judicial authority or as a logical derivative of rule 41 of the Federal Rules of

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U.S. 159 (1977). As one court has observed: "American Telephone & Telegraph has apparently recommended to all Bell Telephone subsidiaries that company participation in a pen register device installation is forbidden as a matter of company policy unless such installation [is] authorized pursuant to 'the safeguards of the federal wiretap statutes.'" Application of the United States for an Order Authorizing the Use of a Pen Register Device, 407 F. Supp. 398, 399 n.1 (W.D. Mo. 1976), *quoting In re* Joyce, 506 F.2d 373, 375 (5th Cir. 1975). *But see* notes 29-32 and accompanying text *infra*.

5. Application of United States in the Matter of an Order Authorizing the Use of a Pen Register or Similar Mechanical Device, 416 F. Supp. 800 (S.D.N.Y. 1976).

6. 18 U.S.C. §§ 2510-2520 (1976). Title III "prescribes the procedure for securing judicial authority to intercept wire communications in the investigation of specified serious offenses." United States v. Giordano, 416 U.S. 505, 507 (1974). For a detailed discussion of Title III, *see* J. CARR, THE LAW OF ELECTRONIC SURVEILLANCE (1977). For a discussion of the authorization process under Title III, *see* Pulaski, *Authorizing Wiretap Applications Under Title III: Another Dissent to* Giordano *and* Chavez, 123 U. PA. L. REV. 750 (1975). For the legislative history of Title III, *see* note 25 *infra*.

7. Application of United States in the Matter of an Order Authorizing the Use of a Pen Register or Similar Mechanical Device, 416 F. Supp. 800, 801 (S.D.N.Y. 1976).

8. 28 U.S.C. § 1651(a) (1976). The All Writs Act provides: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." *Id.* Once it has been established that a court has jurisdiction over a matter, the Act enables the court, in its discretion, to issue all writs necessary to preserve and protect its authority. *See* Application of the United States in the Matter of an Order Authorizing the Use of a Pen Register or Similar Mechanical Device, 538 F.2d 956, 961 (2d Cir. 1976), *rev'd on other grounds sub nom.* United States v. New York Tel. Co., 434 U.S. 159 (1977). For a discussion of the All Writs Act, *see* notes 43-47 and accompanying text *infra*. For cases in which the All Writs Act was applied, *see, e.g.*, Board of Educ. v. York, 429 F.2d 66, 69 (10th Cir. 1970); United States v. Field, 193 F.2d 92, 96 (2d Cir. 1951); United States v. McHie, 196 F. Supp. 586, 588 (N.D. Ill. 1912). *See also* FTC v. Dean Foods Co., 384 U.S. 597, 608-12 (1966); Price v. Johnston, 334 U.S. 266, 282-84 (1948); Adams v. United States, 317 U.S. 269, 272-73 (1942).

9. Application of United States in the Matter of an Order Authorizing the Use of a Pen Register or Similar Mechanical Device, 416 F. Supp. 800, 801-04 (S.D.N.Y. 1976).

10. The original order had been extended for an additional 20 days. United States v. New York Tel. Co., 434 U.S. 159, 163 n.3 (1977).

11. Application of the United States in the Matter of an Order Authorizing the Use of a Pen Register or Similar Mechanical Device, 538 F.2d 956, 958-59 (2d Cir. 1976). The court further concluded that pen registers were not regulated or prohibited by any other federal statute. *Id.* at 959.

Criminal Procedure (rule 41).[12] The court of appeals, however, reversed that portion of the district court's holding which required the Company to render assistance to the FBI.[13] The Second Circuit assumed, *arguendo*, "that a district court has inherent discretionary authority or discretionary power under the All Writs Act to compel technical assistance by the Telephone Company"[14] but concluded that the court had abused its discretion in this particular case in ordering the Company to aid the government.[15]

On writ of certiorari, the United States Supreme Court agreed that Title III does not govern the use of pen registers and that rule 41 authorizes electronic intrusions upon a finding of probable cause.[16] The Court reversed the decision of the Second Circuit, however, *holding* that pursuant to the All Writs Act, a district court may compel the assistance of a third party who is in a position to frustrate the implementation of a court order or the proper administration of justice.[17] *United States v. New York Telephone Co.*, 434 U.S. 159 (1977).

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12. *Id.* at 959-60, *citing* FED. R. CRIM. P. 41. For the text of rule 41, *see* note 37 *infra*. The court also noted that "a pen register order involves a search and seizure under the Fourth Amendment, and . . . a court may issue such an order only upon a showing of probable cause." 538 F.2d at 959.

13. 538 F.2d at 960-63.

14. *Id.* at 961. For a discussion of the All Writs Act, *see* note 8 *supra*.

15. 538 F.2d at 961. The Second Circuit concluded that the All Writs Act could provide the basis for a district court's authority to compel technical assistance by the telephone company, but noted that such an order was not always proper. *Id.* The court pointed out that the Act "is entirely permissible in nature" and "is addressed to the discretionary power of the court." *Id.* Consequently, the Second Circuit propounded a balancing test under which the trial court would weigh the factors militating towards the issuance of such an order against the danger of establishing a precedent whereby federal courts could compel unwilling third parties to assist in criminal law enforcement activities. *Id.* The favorable factors examined by the Second Circuit were: 1) that FBI agents could not effectively install the pen registers without the assistance of the Company; 2) that the Company would only be required to expend minimal time and effort in helping with the installation of the devices; 3) that fear of civil or criminal liability by the Company was groundless; 4) that the Company would be compensated for its services; and 5) that law enforcement would be thwarted absent the issuance of such an order. *Id.* at 961-62.

Although a balancing test was espoused, the court seemed to indicate that the issuance of an order compelling assistance by a third party would be an abuse of discretion in all cases. *Id.* at 961-63. The court stated that "in the absence of specific and properly limited Congressional action, it was an abuse of discretion for the District Court to order the Telephone Company to furnish technical assistance." *Id.* at 961. The majority was concerned that "such an order could establish a most undesirable, if not dangerous and unwise, precedent for the authority of federal courts to impress unwilling aid on private third parties." *Id.* at 962. The court stated that if "the Government requires technical assistance, it is far better to have the authority for ordering that assistance clearly defined by statute rather than deriving the authority from the very general All Writs Act." *Id.* at 962-63.

In a vigorous dissenting opinion, Judge Mansfield rejected the majority's abuse of discretion theory. *Id.* at 963 (Mansfield, J., dissenting). Judge Mansfield argued that the district courts were in the best position to determine, on a case-by-case basis, whether a compelling need for an ancillary order existed, and the dissent therefore concluded that the legislative action called for by the majority was inappropriate. *Id.* at 965 (Mansfield, J., dissenting).

16. United States v. New York Tel. Co., 434 U.S. 159, 165-70 (1977).

17. *Id.* at 172-74. Since the original order authorizing the use of the pen registers had been extended, *see* note 10 *supra*, the FBI had completed its surveillance by the time the circuit

In 1934, Congress enacted section 605 of the Federal Communications Act (section 605),[18] which prohibited anyone not authorized by the sender of "wire or radio" communications from intercepting or divulging the contents of those communications or the facts of their transmission.[19] This statutory restriction on the use of electronic surveillance techniques in criminal investigations was applied in *Nardone v. United States*,[20] where the Supreme Court determined that section 605 prohibited the use of wiretap evidence in criminal prosecutions.[21] Moreover, section 605 had been construed as proscribing the admissibility of direct wiretap evidence and evidence derived from information obtained during the unlawful interception.[22] In maintaining this broad interpretation of section 605, the use of pen registers had repeatedly been considered a violation of this provision.[23] The development of the law in this area, however, was frequently criticized for its inconsistency and nonuniform application.[24]

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court issued its decision. 434 U.S. 159, 165 n.6. However, the Supreme Court determined that the case was not rendered moot "because the controversy here is one 'capable of repetition, yet evading review.'" *Id.*, *quoting* Roe v. Wade, 410 U.S. 113 (1973); Southern Pac. Terminal Co. v. ICC, 219 U.S. 498 (1911).

18. As originally enacted, § 605 provided in pertinent part:

> [N]o person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, (1) to any person other than the addressee, his agent or attorney, (2) to a person employed or authorized to forward such communication to its destination, . . . or (6) on demand of other lawful authority. No person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person . . . .

Act of June 19, 1934, ch. 652, § 605, 48 Stat. 1103, *as amended by* Act of June 19, 1968, Pub. L. No. 90-351, tit. III, § 803, 82 Stat. 223 (current version at 47 U.S.C. § 605 (1970)).

19. Act of June 19, 1934, ch. 652, § 605, 48 Stat. 1103, *as amended by* Act of June 19, 1968, tit. III, § 803, 82 Stat. 223 (current version at 47 U.S.C. § 605 (1970)). For a general discussion of the historical development of electronic surveillance, *see* 8A J. MOORE, RULES OF CRIMINAL PROCEDURE ¶ 41.08-.08[4] (2d ed. 1977); C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 665 (1969).

20. 302 U.S. 379 (1937). The Court focused on the second sentence of § 605, which prohibited the interception and divulgence of communications by anyone not authorized by the sender. *Id.* at 382-83. For the text of the original version of § 605, *see* note 18 *supra*.

21. 302 U.S. at 384. In so holding, the Court rejected the argument that since federal law enforcement officials were not specifically mentioned in § 605, they were not subject to the prohibitions of that provision. *Id.* *See* C. WRIGHT, *supra* note 19 § 665, at 45 n.97.

22. *See, e.g.*, Nardone v. United States, 308 U.S. 338, 341 (1939); Weiss v. United States, 308 U.S. 321, 329, 331 (1939) (holding also that § 605 was applicable to intrastate as well as interstate communications).

23. *See, e.g.*, United States v. Dote, 371 F.2d 176 (7th Cir. 1966); United States v. Caplan, 255 F. Supp. 805 (E.D. Mich. 1966); United States v. Guglielmo, 245 F. Supp. 534 (N.D. Ill. 1965), *aff'd*, 371 F.2d 176 (7th Cir. 1966). In *Dote*, the Seventh Circuit determined that the electronic impulses emitted while a telephone number was being dialed were "wire communications" within the meaning of § 605. United States v. Dote, 371 F.2d at 180. Consequently, the interception of these signals with a pen register was considered a violation of the statute. *Id.*

24. *See* PRESIDENT'S COMM. ON LAW ENFORCEMENT & ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 201-03 (1967).

In 1968, Congress responded to this dissatisfaction by enacting Title III,[25] which liberalized the use of wiretapping by law enforcement agents[26] and amended section 605.[27] Title III is a comprehensive wiretap statute in which "Congress authorized wire interceptions for the investigation of specific crimes as long as the safeguards of minimization and supervision by the court were evinced."[28] Most federal courts agree that pen registers are

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25. 18 U.S.C. §§ 2510-2520 (1976) (originally enacted as Act of June 19, 1968, tit. III, § 802, 82 Stat. 187, *as amended by* Act of July 29, 1970, tit. II, § 211(b), (c), 84 Stat. 654 (amending §§ 2511, 2518, 2520); Act of Oct. 15, 1970, tit. II, § 227(a), tit. VIII, § 810, tit. IX, § 902(a), tit. XI, § 1103, 84 Stat. 930 (repealing § 2514; amending §§ 2516, 2517; Act of Jan. 2, 1971, tit. IV, § 16, 85 Stat. 1891 (amending § 2516)). Title III provides in pertinent part:

§ 2510. DEFINITIONS.

As used in this chapter —

(1) "wire communication" means any communication made in whole or part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications;

(2) "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation;

. . . .

(5) "electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire or oral communication other than —

(a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a communications common carrier in the ordinary course of its business; or (ii) being used by a communications common carrier in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties. . . .

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§ 2518. PROCEDURE FOR INTERCEPTION OF WIRE OR ORAL COMMUNICATIONS.

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(4) . . . An order authorizing the interception of a wire or oral communication shall, upon request of the applicant, direct that a communication common carrier . . . shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier . . . is according the person whose communications are to be intercepted.

18 U.S.C. §§ 2510(1), (2), (5)(a), 2518(4) (1976).

26. *See* C. WRIGHT, *supra* note 19, § 665, at 55 n.43.

27. *See* Act of June 19, 1968, Pub. L. No. 90-351, tit. III, § 803, 82 Stat. 223 (amending 47 U.S.C. § 605 (1970)). Section 605 was amended in two major respects. The introductory clause "except as authorized by chapter 119, Title 18" was added, and "radio" was inserted in the second sentence before the word "communication." *See* 47 U.S.C. § 605 (1970). In Korman v. United States, 486 F.2d 926 (7th Cir. 1973), the court noted that its prior interpretation of § 605 as prohibiting the use of pen registers was no longer controlling because the language of § 605 had been changed to "any *radio* communication." *Id.* at 931-32 n.11 (emphasis added). For a discussion of the Seventh Circuit's interpretation of § 605 prior to the amendment of that provision, *see* note 23 *supra*. It is now generally recognized that the use of pen registers is not proscribed by § 605. *See, e.g.*, Hodge v. Mountain States Tel. & Tel. Co., 555 F.2d 254, 258-61 (9th Cir. 1977); United States v. Falcone, 505 F.2d 478, 482 (3d Cir. 1974), *cert. denied*, 420 U.S. 955 (1975); United States v. Brick, 502 F.2d 219, 223 (8th Cir. 1974). *But see* Note, *The Legal Constraints Upon the Use of the Pen Register as a Law Enforcement Tool*, 60 CORNELL L. REV. 1028, 1030-42 (1975).

28. United States v. Southwestern Bell Tel. Co., 546 F.2d 243, 250 (8th Cir. 1976). Criteria for lawful interceptions under Title III include: 1) the limitation that the interception be in

not subject to the strictures of Title III,[29] the statute's provisions apply only to surveillance involving an "interception," which is defined as the "aural acquisition of the contents of any wire or oral communications."[30] Since the pen register by itself is incapable of aural acquisition,[31] the courts have concluded that the use of the device falls outside the scope of Title III.[32]

In the absence of federal legislation squarely addressing the issue, the source of judicial power to authorize the use of pen registers and to impose limitations on their use has had to be determined by the courts.[33] Some courts have adhered to the notion that the pen register's use must comply with the constitutional requirements of the fourth amendment for search warrants,[34] and one district court has held that some "specific statutory au-

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respect to specified crimes; 2) the requirement of judicial approval of the wiretap request; 3) the judge's finding that normal investigative techniques are inadequate; and 4) stringent compliance with other pre-interception and post-interception procedural safeguards. 18 U.S.C. §§ 2516, 2518(1)-(8) (1976). *See* United States v. Giordano, 416 U.S. 505, 514-15 (1974); Gelbard v. United States, 408 U.S. 41, 46 (1972); J. MOORE, *supra* note 19, ¶ 41.08[4] at 41-125; C. WRIGHT, *supra* note 19, § 665, at 56-59.

29. *See, e.g.*, Michigan Bell Tel. Co. v. United States, 565 F.2d 385, 388 (6th Cir. 1977); United States v. Illinois Bell Tel. Co., 531 F.2d 809, 811-12 (7th Cir. 1976); United States v. Clegg, 509 F.2d 605, 610 n.6 (5th Cir. 1975); United States v. Falcone, 505 F.2d 478, 482 (3d Cir. 1974), *cert. denied*, 420 U.S. 955 (1975); United States v. Finn, 502 F.2d 938, 942 (7th Cir. 1974); United States v. Brick, 502 F.2d 219, 223 (8th Cir. 1974); Korman v. United States, 486 F.2d 926, 931 (7th Cir. 1973); United States v. King, 335 F. Supp. 523, 549 (S.D. Cal. 1971), *aff'd in part and rev'd in part on other grounds*, 478 F.2d 494 (9th Cir. 1973), *cert. denied*, 417 U.S. 920 (1974).

30. 18 U.S.C. § 2510(4) (1976). "'[I]ntercept' means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device." *Id.*

31. For an explanation of how the pen register may be used to intercept the contents of a communication, *see* note 1 *supra*.

32. *See* cases cited note 29 *supra*. *Accord*, United States v. Giordano, 416 U.S. 505, 553 (1974) (Powell, J., concurring in part and dissenting in part). In *Giordano*, Justice Powell stated: "The installation of a pen register device to monitor and record the numbers dialed from a particular telephone line is not governed by Title III." *Id.* Justice Powell was joined by Chief Justice Burger and Justices Blackmun and Rehnquist in this opinion.

This conclusion is buttressed by the legislative history of Title III. *See* S. REP. NO. 1097, 90th Cong., 2d Sess. 90, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2112, 2178. The legislative history explains the intentional exclusion of the device from Title III's regualtion:

> The proposed legislation is not designed to prevent the tracing of phone calls. The use of the "pen register" for example would be permissible. But see *United States v. Dote*, 371 F.2d 176 (7th Cir. 1966). The proposed legislation is intended to protect the privacy of the communication itself and not the means of communication.

Id. For a discussion of the meaning of the "But see *Dote*" language in the senate report, *see* Note, *supra* note 27 at 1035; 1977 DUKE L.J. 751, 752 n.11; *see also* notes 23 & 27 *supra*.

Nevertheless, courts have held that pen registers used in conjunction with wiretaps are subject to the requirements of Title III. *See, e.g.*, Korman v. United States, 486 F.2d 926, 931-32 (7th Cir. 1973); United States v. Focarile, 340 F. Supp. 1033, 1039-40 (D. Md.), *aff'd sub nom.* United States v. Giordano, 469 F.2d 522 (4th Cir. 1972), *aff'd*, United States v. Giordano, 416 U.S. 505 (1974).

33. The Supreme Court has decided to review the decision of the Maryland Supreme Court in Smith v. Maryland, 283 Md. 156, 389 A.2d 858, *cert. granted*, 99 S. Ct. 609 (1978), to determine whether the use of a pen register constitutes a search within the meaning of the fourth amendment. 99 S. Ct. at 609.

34. United States v. Giordano, 416 U.S. 505, 553-54 (1974) (Powell, J., concurring in part and dissenting in part) (footnote omitted). *See* United States v. Southwestern Bell Tel. Co., 546 F.2d 243, 245 (8th Cir. 1975), wherein the court stated that "the propriety of a pen register's

thority or rule" is a necessary prerequisite to such a court order.[35] The majority of circuits, however, have determined that either the court's inherent judicial power[36] or rule 41, which regulates the search and seizure of property by federal law enforcement officials,[37] provides the requisite authority.[38]

Related to the question of the source of the court's power to issue a pen register authorization is the problem of whether a court may compel a third

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usage depends entirely upon compliance with the Fourth Amendment." *Id.* (citation omitted). *See also* United States v. Illinois Bell Tel. Co., 531 F.2d 809, 812-13 (7th Cir. 1976). The fourth amendment allows for warrants to issue with respect to intangible as well as tangible items that are proper subjects of a search. Katz v. United States, 389 U.S. 347, 354-56 (1967) (fourth amendment applies to intangible information seized by electronic surveillance); Berger v. New York, 388 U.S. 41, 51-52 (1967) (seizure of evidence by electronic surviellance).

35. Application of United States for an Order Authorizing the Use of a Pen Register Device, 407 F. Supp. 398, 403 (W.D. Mo. 1976).

36. *See, e.g.*, United States v. John, 508 F.2d 1134, 1141 (8th Cir.), *cert. denied*, 421 U.S. 962 (1975); United States v. Best, 363 F. Supp. 11, 17-18 (S.D. Ga. 1973); United States v. Escandar, 319 F. Supp. 295 (S.D. Fla. 1970). These courts, in relying upon their inherent judicial authority to order the use of the pen register, have stressed the fact that there was probable cause for the use of the device. *See also* United States v. Southwestern Bell Tel. Co., 546 F.2d 243, 245 (8th Cir. 1976) (court's power to order electronic surveillance is equivalent to power to order a search warrant and is inherent in district court).

37. Rule 41 of the Federal Rules of Criminal Procedure provides in pertinent part:

> (a) A search warrant authorized by this rule may be issued by . . . a federal magistrate . . . within the district wherein the property sought is located, upon request of a federal law enforcement officer . . . .
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> (b) A warrant may be issued under this rule to search for and seize any (1) property that constitutes evidence of the commission of a criminal offense, or (2) contraband, the fruits of crime, or things otherwise criminally possessed, or (3) property designed or intended for use or which is or has been used as the means of committing a criminal offense.
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> (c) If the federal magistrate . . . is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched.
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> . . . .
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> (h) The term "property" is used in this rule to include documents, books, papers and any other tangible objects.

FED. R. CRIM. P. 41.

38. *See, e.g.*, Michigan Bell Tel. Co. v. United States, 565 F.2d 385, 389 (6th Cir. 1977) (orders issued pursuant to rule 41); United States v. Illinois Bell Tel. Co., 531 F.2d 809, 813 (7th Cir. 1976) (district courts have power under rule 41 to authorize use of pen register).

Due to recent technological advances, rule 41 has been interpreted as applying to the search and seizure of intangible evidence as well as tangible property. *See id.* Although the courts concede that electronic impulses recorded by pen registers are not "property" in the strict sense of that term as it is used in rule 41(b), FED. R. CRIM. P. 41(b), it is urged that the rule nevertheless authorizes an order directing a "seizure" of intangible evidence. *See* Michigan Bell Tel. Co. v. United States, 565 F.2d 385, 389 (6th Cir. 1977). *But cf.* Application of United States for an Order Authorizing the Use of a Pen Register Device, 407 F. Supp. 398 (W.D. Mo. 1976). In this case, the Government argued that the Supreme Court's opinions dealing with electronic surveillance indicate that "the technical requirements of Rule 41 would not be applied to prohibit a sophisticated investigative technique merely because Rule 41 was drafted in terms of physical, rather than electronic, evidence." *Id.* at 399, *citing* Katz v. United States, 389 U.S. 347 (1967); Berger v. New York, 388 U.S. 41 (1967); Osborn v. United States, 385 U.S. 323 (1966). The court concluded, however, that an order authorizing the use of pen registers had to be based on some legal authority other than rule 41. 407 F. Supp. at 404. *Accord*, United States v. Southwestern Bell Tel. Co., 546 F.2d 243 (8th Cir. 1976).

party to assist the government in implementing the order. Those courts which have concluded that pen registers are not subject to the requirements of Title III would necessarily find that the provisions of that statute which authorize corollary orders to compel the assistance of third parties are also inapplicable.[39] Many courts, however, have held that the scope of authority granted under the All Writs Act,[40] or the inherent judicial power of the court,[41] is determinative of this issue.[42]

The All Writs Act empowers a federal court to enter those orders it deems necessary to preserve and protect its jurisdiction.[43] The Act does not enlarge the court's jurisdiction, but rather serves to effectuate the established jurisdiction of the court.[44] This power has traditionally been used to enforce prior orders of the court that are threatened by noncompliance or by obstruction by third parties.[45]

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39. Under Title III, third parties may be compelled to assist in the installation of a wiretap. *See* 28 U.S.C. § 2518(4) (1976). For the text of this provision, *see* note 25 *supra*.

40. 28 U.S.C. § 1651(a) (1976). For the text of this provision, *see* note 8 *supra*.

41. The inherent power theory stems from United States v. Illinois Bell Tel. Co., 531 F.2d 809 (7th Cir. 1976), where the court interpreted § 2518 of Title III, 28 U.S.C. § 2518 (1976), as "strong and persuasive authority, by analogy, for the proposition that district courts in the area of electronic surveillance, inherently have power to effectively compel compliance with validly issued orders." 531 F.2d at 814. In Application of the United States for Relief, 427 F.2d 639 (9th Cir. 1970), the Ninth Circuit had concluded that the district court lacked statutory and inherent authority to compel the aid of the telephone company in the installation of a wiretap. *Id.* at 644. Seventy-two days later, Congress amended § 2518(4) to authorize a district court to compel a communication carrier to furnish all necessary technical assistance. For the text of § 2518(4), *see* note 25 *supra*. It has been argued that this action indicated congressional acceptance of the views expressed by the Ninth Circuit. United States v. Southwestern Bell Tel. Co., 546 F.2d 243, 248 (8th Cir. 1976) (Lay, J., dissenting).

A generally accepted view, however, is that Congress originally presumed that the district courts had the power to compel compliance with orders authorizing electronic surveillance. Congress thus was legislating in an area where it had presumed the court's inherent power was sufficient. *See* United States v. Illinois Bell Tel. Co., 531 F.2d 809, 813-14 (7th Cir. 1976). *Accord*, United States v. Southwestern Bell Tel. Co., 546 F.2d 243, 246 (8th Cir. 1976). For a critique of this analysis, *see* Comment, *Judicial Coercion of Unwilling Telephone Companies in Pen Register Cases*, 45 U. CIN. L. REV. 649, 653-54 (1976).

42. *See, e.g.*, Michigan Bell Tel. Co. v. United States, 565 F.2d 385, 389 (6th Cir. 1977); United States v. Illinois Bell Tel. Co., 531 F.2d 809, 814 (7th Cir. 1976). *Contra*, Application of the United States for an Order Authorizing the Use of a Pen Register Device, 407 F. Supp. 398, 405 (W.D. Mo. 1976) (the All Writs Act does not vest the court with independent jurisdictional power to authorize use of a pen register).

43. *See* United States v. Illinois Bell Tel. Co., 531 F.2d 809 (7th Cir. 1976). In *Illinois Bell*, the court noted that the All Writs Act does not expand a court's authority, but rather "confers ancillary jurisdiction where jurisdiction is otherwise granted and lodged in the court." *Id.* at 814 n.8, *citing* United States v. First Fed. Sav. & Loan Ass'n, 248 F.2d 804, 808-09 (7th Cir. 1957), *cert. denied*, 355 U.S. 957 (1958). For a general discussion of the All Writs Act, *see* 9 J. MOORE, RULES OF CRIMINAL PROCEDURE ¶ 110.26 (2d ed. 1977); Bell, *The Federal Appellate Courts and the All Writs Act*, 23 SW. L.J. 858 (1969); note 8 *supra*.

44. 9 J. MOORE, *supra* note 43, ¶ 110.26, at 282. *See* cases cited note 8 *supra*.

45. *See, e.g.*, Faubus v. United States, 254 F.2d 797, 805 (8th Cir. 1958) (preliminary injunction issued against state officials prohibiting their use of National Guard to frustrate court approved school integration plan); Mississippi Valley Barge Line Co. v. United States, 273 F. Supp. 1, 6 (E.D. Mo. 1967), *aff'd*, 389 U.S. 579 (1968) (use of All Writs Act to enjoin persons from thwarting compliance with original order to which not parties).

Once the district court establishes an independent basis under rule 41 for the use of pen registers, it may conclude that the order compelling the cooperation of the third party is necessary to effectuate the underlying order and is authorized by the All Writs Act.[46] A number of circuits have thus relied on the Act as authority for the issuance of remedial orders, stating that the Act provides support "for the proposition that the telephone company cannot frustrate the exercise of the district court's order by refusing to make available its facilities."[47]

It was against this historical background that the Supreme Court began its analysis of whether a district court may direct a telephone company to provide necessary assistance to law enforcement officials in their use of pen registers.[48] The Court initially determined that the use of pen registers was not governed by Title III since the devices "do not acquire the 'contents' of communications" as required by that statute.[49]

The Court further determined that federal courts were granted the authority to direct the installation of pen registers under rule 41.[50] Examining the language of the rule, the Court observed that it was sufficiently broad to encompass an electronic "search" intended to discover the suspected criminal use of a telephone and the "seizure" of evidence the "search" might reveal.[51] The Court explained that rule 41 should be interpreted flexibly "to include within its scope electronic intrustions authorized upon a finding of probable cause"[52] because a contrary holding would create the anomalous result of permitting the interception of conversations by wiretapping under Title III while prohibiting the limited intrusions resulting from the use of pen registers.[53]

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46. United States v. Illinois Bell Tel. Co., 531 F.2d 809, 814 (7th Cir. 1976).

47. *Id. Accord,* Michigan Bell Tel. Co. v. United States, 565 F.2d 385 (6th Cir. 1977); United States v. Southwestern Bell Tel. Co., 546 F.2d 243 (8th Cir. 1976). These courts have recognized that the failure to direct the telephone company to provide expert assistance in the installation of the devices would effectively operate to nullify the original order. Michigan Bell Tel. Co. v. United States, 565 F.2d at 389; United States v. Southwestern Bell Tel. Co., 546 F.2d at 246-47.

In *Michigan Bell,* the court emphasized the fact that the telephone company was not an ordinary third party, but rather was a "public utility, enjoying a monopoly in an essential area of communications." 565 F.2d at 389. The court thus determined that the company was in an especially important position to assist in the detection and prevention of crime. *Id.*

48. United States v. New York Tel. Co., 434 U.S. 159, 161 (1977).

49. *Id.* at 166-67. The Court noted that its conclusion was supported by the legislative history of Title III. *Id.* at 167-68. *See* notes 29-32 and accompanying text *supra.*

50. 434 U.S. at 168-69. For the text of rule 41, *see* note 37 *supra.*

51. 434 U.S. at 169.

52. *Id.* at 169 (citations omitted). The Court recognized that the definition of property in rule 41(h), FED. R. CRIM. P. 41(h), refers to "tangible" objects, but concluded that this was not intended to be an exclusive definition. 434 U.S. at 169. For the text of rule 41(h), *see* note 37 *supra.* Rather, the Court stated: "Where the definition of a term in Rule 41(h) was intended to be all inclusive, it is introduced by the phrase 'to mean' rather than 'to include.'" 434 U.S. at 169 n.15 (citation omitted).

53. 434 U.S. at 170 & n.18. According to the Court, such an "anomalous result" would be contrary to the congressional judgment "that the use of pen registers 'be permissible.'" *Id.* at 170, *quoting* S. REP. NO. 1097, 90th Cong., 2d Sess. 90, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS. 2112, 2178. *See* notes 29-32 and accompanying text *supra.* The Court buttressed

In discussing the propriety of that part of the order which compelled the Company to assist in the installation and operation of the devices, the Court acknowledged the circuit court's concern [54] that such a directive constitutes a significant infringement on a third party's individual rights.[55] Recognizing that a court cannot impose unreasonable burdens on the third party,[56] the Court nonetheless concluded that pursuant to the All Writs Act, a trial court can issue an order necessary "to effectuate and prevent the frustration of orders it has previously issued." [57] The Act, the Court indicated, is applicable not only to the original parties, but also to those who, although not original parties, are in a position to obstruct the implementation of a court order.[58]

Applying these principles to the facts of the instant case, the Court reasoned that since the Company's property was suspected of being used in criminal activities, the Company was sufficiently involved in the underlying controversy to be subject to an assistance order.[59] Evaluating the burden of compliance with the district court's order, the Court determined that the Company would not be unduly burdened.[60] In addition, it was determined that the Company's assistance was absolutely necessary to accomplish the covert installation of the pen register device.[61] The Court thus upheld the

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its argument by referring to rule 57(b) of the Federal Rules of Criminal Procedure, FED. R. CRIM. P. 57(b), which provides: "If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute." 434 U.S. at 170, *quoting* FED. R. CRIM. P. 57(b) (footnote omitted).

54. *See* notes 13-15 and accompanying text *supra*.

55. 434 U.S. at 171. The Court interpreted the circuit court's holding as "generally barring district courts from ordering any party to assist in the installation or operation of a pen register." *Id.* For a discussion of the Second Circuit's analysis in *New York Telephone*, *see* notes 10-15 and accompanying text *supra*.

56. 434 U.S. at 172. The Court stated: "We agree that the power of federal courts to impose duties upon third parties is not without limits; unreasonable burdens may not be imposed." *Id.*

57. *Id.* The Court reviewed cases in which § 262 of the Judicial Code, Pub. L. No. 61-475, ch. 11, § 262, 36 Stat. 1162 (1911), the predecessor to the All Writs Act, had been liberally construed in order to aid the courts in the performance of their duties. 434 U.S. at 172-73, *citing* Price v. Johnston, 334 U.S. 266, 282 (1948) (habeas corpus order issued requiring a prisoner to argue his own appeal before federal court of appeals); Adams v. United States, 317 U.S. 269, 273 (1942) (federal court has power to issue writ of habeas corpus incident to appeal pending before the court).

58. 434 U.S. at 174, *citing* Board of Educ. v. York, 429 F.2d 66 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971); Mississippi Valley Barge Line Co. v. United States, 273 F. Supp. 1 (E.D. Mo. 1967), *aff'd*, 389 U.S. 579 (1968). *See* notes 39-47 and accompanying text *supra*.

59. 434 U.S. at 174. The Court stated: "[W]e do not think that the Company was a third party so far removed from the underlying controversy that its assistance could not be permissibly compelled." *Id.*

60. *Id.* at 174-75. The Court noted that the Company would be compensated for the use of its facilities and for any technical assistance provided, that the order required minimal effort on the part of its employees, and that the Company, as a highly regulated public utility, had a duty to serve the public. *Id.*

61. *Id.* at 175. *See* note 4 and accompanying text *supra*. While noting that citizens have often been requested to provide assistance to law enforcement officials, the Court stated: "[W]e do not address the question of whether and to what extent such a general duty may be legally enforced in the diverse contexts in which it may arise." 434 U.S. at 175-76 n.24.

district court's order compelling the Company to furnish facilities and technical assistance to the FBI in connection with the use of the pen registers.[62]

In a dissenting opinion,[63] Justice Stevens disagreed with the majority's "patchwork interpretation" of rule 41 and the broad construction given the All Writs Act.[64] The dissent stated that rule 41 is not a "general authorization for district courts to issue any warrants not otherwise prohibited," but rather operates as a limitation on the circumstances under which a warrant may be obtained and the kind of property that may be seized.[65]

Focusing on the definition of "property" contained in the rule,[66] and on other operative provisions,[67] Justice Stevens concluded that the warrants authorized by rule 41 are limited to searches for tangible property.[68] Continuing, the dissent reasoned that Congress, after it had carefully drafted a comprehensive statute regulating the use of wiretaps, did not intend to authorize the issuance of warrants for electronic seizure of intangible evidence without providing clear statutory safeguards.[69] Consequently, the dissent

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62. 434 U.S. at 174-78.

63. *Id.* at 178 (Stevens, J., dissenting in part). Justices Brennan and Marshall joined in Justice Stevens' dissent. Justice Stewart concurred in the majority opinion in so far as it determined that pen registers were not subject to Title III and that a district court had the authority to issue an order regarding their use. *Id.* (Stewart, J., concurring in part and dissenting in part). Justice Stewart, however, agreed with the dissenters that the district court could not compel the Company to assist the government in the installation of the device. *Id.*

64. *Id.* at 179 (Stevens, J., dissenting in part). The dissent agreed with the majority's conclusion that Title III does not govern the use of pen registers. *Id.* at 182 (Stevens, J., dissenting in part). For a discussion of the majority's position on this issue, *see* note 49 and accompanying text *supra.*

65. 434 U.S. at 182 (Stevens, J., dissenting in part). Justice Stevens supported his conclusion by referring to the enactment of Title IX of the Omnibus Crime Control and Safe Streets Act of 1968 (Title IX), 18 U.S.C. § 3103(a) (1976), which authorized the issuance of a warrant for property that constitutes "mere evidence" of criminal activity as distinguished from fruits or instrumentalities of a crime. 434 U.S. at 182-84 (Stevens, J., dissenting in part). Prior to the enactment of Title IX, "mere evidence" could not be the subject of a valid seizure. *Id.* at 183. (Stevens, J., dissenting in part). According to Justice Stevens, in Warden v. Hayden, 387 U.S. 294 (1967), the Supreme Court discarded the "mere evidence" rule, and Title IX was enacted in response to the inconsistency that existed between the *Hayden* holding—which removed the constitutional bar to the search and seizure of mere evidence—and rule 41—which did not authorize the issuance of a warrant for mere evidence. 434 U.S. at 183 (Stevens, J., dissenting in part).

The dissent argued that if rule 41 were intended as a general authorization for warrants not otherwise prohibited by the fourth amendment, there would have been no need to enact Title IX to encompass "mere evidence." *Id.* at 184 (Stevens, J., dissenting in part).

66. 434 U.S. at 184-85 (Stevens, J., dissenting in part), *citing* FED. R. CRIM. P. 41(h). For the text of this provision, *see* note 37 *supra.*

67. 434 U.S. at 185 (Stevens, J., dissenting in part), *citing* FED. R. CRIM. P. 41(c), (d), (e). Justice Stevens reasoned that those provisions which concern the issuance of a warrant, the preparation of an inventory of property seized pursuant to a search warrant and defendant's motion requesting the return of seized property, would be "almost meaningless if read as relating to electronic surveillance of any kind." 434 U.S. at 185 (Stevens, J., dissenting in part).

68. 434 U.S. at 184-85 (Stevens, J., dissenting in part). Justice Stevens noted that each item listed in the definition of property in rule 41(h) was "tangible," and that the final reference to "any other tangible items" must have defined the "outer limits of the included category." *Id.* at 184 (Stevens, J., dissenting in part) (footnote omitted), *quoting* FED. R. CRIM. P. 41(h).

69. 434 U.S. at 184-85 (Stevens, J., dissenting in part).

concluded that the district court lacked the power to issue the order authorizing the use of the pen registers by the FBI.[70] Since the initial order was "a nullity," the dissent maintained that "[i]t cannot, therefore, support the further order requiring the . . . Company to aid in the installation of the device."[71]

Assuming, *arguendo*, that the pen register authorization was valid, Justice Stevens nevertheless concluded that the All Writs Act did not empower the district court to issue the order directing the Company to assist in the installation of the devices.[72] The dissent noted that the Act limited the court's action to that "in aid of *its* duties and *its* jurisdiction."[73] Recognizing that the majority supported its position that the issuance of the order was necessary or appropriate to aid the district court's jurisdiction, Justice Stevens concluded that the directive merely facilitated the performance of the FBI's investigatory functions.[74] According to the dissent, the majority's construction of the Act provided "a sweeping grant of authority entirely without precedent in our Nation's history."[75]

As the dissent indicated, the Court's determination that rule 41 authorizes the issuance of pen register orders is subject to criticism.[76] By

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70. *Id.* at 186 (Stevens, J., dissenting in part). Justice Stevens stated: "[T]he focus of inquiry should . . . [be] whether Congress has expressly authorized . . . [the intrusion], and no such authorization can be drawn from Rule 41." *Id.* (Stevens, J., dissenting in part). The dissent continued:

> [T]here is nothing anomalous about concluding that it is a forbidden activity until Congress has prescribed the safeguards that should accompany any warrant to engage in it. Even if an anomaly does exist, it should be cured by Congress rather than by a loose interpretation of "property" under Rule 41 which may tolerate sophisticated electronic surveillance techniques never considered by Congress and presenting far greater dangers of intrusion than pen registers.

Id. at 185 n.14 (Stevens, J., dissenting in part) (citations omitted).

71. *Id.* at 186 (Stevens, J., dissenting in part).

72. *Id.* at 186-90 (Stevens, J., dissenting in part). The dissent stated it is an "undisputed fact that the All Writs Act does not provide federal courts with an independent grant of jurisdiction." *Id.* at 188 n.19 (Stevens, J., dissenting in part), *citing* Rosenbaum v. Bauer, 120 U.S. 450 (1887); McIntire v. Wood, 11 U.S. (7 Cranch) 504 (1813).

73. 434 U.S. at 189 (Stevens, J., dissenting in part) (emphasis supplied by the dissent) (footnote omitted). Moreover, while recognizing that "the court's power to issue an order requiring a *party* to carry out the terms of the original judgment is well settled," the dissent noted that even this power is subject to certain restraints. *Id.* at 188 (Stevens, J., dissenting in part) (emphasis added).

74. *Id.* at 188-89 & nn.19 & 20 (Stevens, J., dissenting in part). "The fact that a party may be better able to effectuate its rights or duties if a writ is issued never has been, and under the language of the . . . [Act] cannot be, a sufficient basis for issuance of the writ." *Id.* at 189 (Stevens, J., dissenting in part) (citations omitted). Justice Stevens emphasized that while writs issued in aid of a court's jurisdiction will usually benefit one of the parties to the original order, the converse is not always true. *Id.* n.20 (Stevens, J., dissenting in part). The dissent continued: "Concededly, citizen cooperation is always a desired element in any government investigation, and lack of cooperation may thwart such an investigation, even though it is legitimate and judicially sanctioned. . . . [But] [p]lainly the District Court's jurisdiction does not ride on the Government's shoulders until successful completion of an electronic surveillance." *Id.* at 190 (Stevens, J., dissenting in part) (footnote omitted).

75. *Id.* at 190 (Stevens, J., dissenting in part).

76. For a discussion of the dissent's analysis with respect to this issue, *see* notes 63-70 and accompanying text *supra*.

construing rule 41(h)[77] as being merely an illustration of the kinds of property covered by the rule, rather than a comprehensive enumeration of the items included,[78] the majority ignored the clear wording of the rule, which refers to searches for "tangible" objects.[79]

Furthermore, in light of the comprehensive statutory scheme for the regulation of wiretaps provided in Title III,[80] it is suggested that the use of any investigative electronic surveillance device not included therein[81] should be expressly regulated by Congress. It is submitted the Court should not presume that authority to issue pen register orders exists in rule 41 absent a clear congressional expression of intent similar to that expressed in Title III.

Additionally, the Court's determination that the All Writs Act was applicable in *New York Telephone* is subject to criticism. The Court's conclusion that the Act provides statutory authority for a court to compel third parties to assist in the implementation of an order, guided only by judicial discretion in weighing the respective interests and burdens of the parties,[82] disregards the fact that the Act's applicability is limited to orders in aid of the court's jurisdiction.[83] While the Company's refusal to help the FBI clearly hinders the government's investigation, it does not in any way impinge on the district court's authority.[84] Since the Act does not provide the federal courts with an independent grant of jurisdiction[85] and the majority failed to specify the source of the district court's jurisdiction over the Company, it is submitted that the invocation of the All Writs Act to justify compelling the Company to aid the government[86] was inappropriate.

The *New York Telephone* Court has not answered the attendant question of the extent to which a court may use the All Writs Act to compel a third party's assistance in a criminal investigation.[87] While recognizing an obligation of the public to aid in the detection of crime and the enforcement

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77. For the text of rule 41, *see* note 37 *supra*.

78. *See* note 52 and accompanying text *supra*. The majority stated: "[T]he definition of property set forth in Rule 41(h) is introduced by the phrase, '[t]he term 'property' is used in this rule to *include*' [emphasis added], which indicates that it was not intended to be exhaustive.'" 434 U.S. at 170 n.18.

79. *See* FED. R. CRIM. P. 41(h). *See* notes 65-68 and accompanying text *supra*.

80. *See* notes 25-28 and accompanying text *supra*.

81. *See* notes 29-32 and accompanying text *supra*.

82. 434 U.S. at 174-78. *See* notes 54-62 and accompanying text *supra*.

83. 434 U.S. at 188-89 (Stevens, J., dissenting in part). *See* notes 43-44 & 72-75 and accompanying text *supra*.

84. 434 U.S. at 189-90 (Stevens, J., dissenting in part). As Justice Stevens stated:

> [U]nless the Court is of the opinion that the District Court's interest in its jurisdiction was coextensive with the Government's interest in a successful investigation, there is simply no basis for concluding that the inability of the Government to achieve the purposes for which it obtained the pen register order in any way detracted from or threatened the District Court's jurisdiction.

Id. at 190 (Stevens, J., dissenting in part).

85. *See* note 72 *supra*. *See also* notes 43 & 44 and accompanying text *supra*.

86. *See* notes 56-59 and accompanying text *supra*.

87. *See* note 61 *supra*.

of the law,[88] the majority has failed to adequately consider the serious intrusions of privacy which result from compelling a reluctant third party to participate in law enforcement activities.[89] Although the Court relied heavily on the status of the Company as a highly regulated public utility in its analysis of the propriety of the third party order,[90] it did not expressly limit its holding to the particular factual situation presented and did not provide the federal courts with clear standards to apply in future cases.[91] Consequently, serious questions remain as to the appropriate analysis to be employed in cases where the third party is a private citizen.

It is submitted that Congress is best equipped to make the policy determination of whether a court should be empowered to direct a third party to assist in the enforcement of criminal laws.[92] It is hoped that Congress will act to remedy the Court's expansive construction of the All Writs Act by enacting specific legislation that outlines the extent to which third parties may be compelled to assist in criminal investigations. It is further hoped that Congress will determine that the All Writs Act should not be invoked to permit the issuance of an ancillary order to one who is not a party to the original order.[93] Absent such congressional action, the Court's decision in *New York Telephone* may facilitate significant impositions on third parties by forcing them to assist federal officers as a result of a broad construction of the statute.[94]

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88. 434 U.S. at 175-76 n.24. The Court indicated that citizens have an obligation to relate any knowledge that they have of the commission of a crime. *Id.* Moreover, the Court suggested that a district court's power to issue subpoenas to nonparty witnesses is evidence of the fact that citizens have a duty to aid in the enforcement of the law. *Id.*

89. One commentator has suggested that the primary policy reason for not compelling assistance in the installation of a pen register is the dangerous precedent that would be set "for pressing unwilling citizens into a government service in the future." 1977 DUKE L.J. 751, 772. In *New York Telephone,* the Court may have established a precedent whereby a district court may now order a private citizen to open his home to government agents so that they may more effectively investigate the neighbor next door. *But see* note 61 *supra.*

90. *See* notes 59 & 60 and accompanying text *supra. See also* Michigan Bell Tel. Co. v. United States, 565 F.2d 385, 386 (6th Cir. 1977) (telephone company is not an ordinary third party since it is a public utility enjoying a monopoly in an essential area of communications and may be compelled to assist the government).

91. *See* note 56 and accompanying text *supra.*

92. *See* Note, *supra* note 89, at 771 (as a matter of justiciability, the Court may determine that the issue of the propriety of an order compelling the assistance of a third party in a criminal investigation is a political question best left to Congress). *But see* Application of the United States in the Matter of an Order Authorizing the Use of a Pen Register or Similar Mechanical Device, 538 F.2d at 965 (Mansfield, J., dissenting) (courts are better equipped than Congress to determine the conditions under which assistance should be compelled). *Cf. id.* at 962 (the potential dangers of such an order militate against compelling a third party's assistance). *See also* Application of the United States for an Order Authorizing the Use of a Pen Register Device, 407 F. Supp. 398, 405 (W.D. Mo. 1976) (express statutory language, not ambiguous legislative history, should guide judicial interpretation).

93. *See* notes 57-59 and accompanying text *supra.*

94. For a discussion of alternative theories for compelling a telephone company's assistance in installing a pen register, *see* Comment, *supra* note 41 at 657-58.

Since the pen register was recognized by the *New York Telephone* Court as an effective investigative tool,[95] the imposition of strict safeguards on their use has become imperative. Congress should not eschew this opportunity to promulgate comprehensive guidelines for the use of pen registers analogous to those provided in Title III for other forms of electronic surveillance.[96]

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95. 434 U.S. at 168, 178.
96. *See* notes 25-28 and accompanying text *supra*.